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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-6

INTERSTATE COMMERCE COMMISSION
MATTHEW PAOLO, DIRECTOR, BUREAU OF ACCOUNTS,
AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

BURLINGTON NORTHERN, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether Section 20(5) of the Interstate Commerce Act, which authorizes the Interstate Commerce Commission to prescribe a uniform system of accounts and to have access thereto, can be construed to require carriers to furnish to the Commission, upon demand, income and cash flow forecasts which: (a) are not documents forming a part of the system of accounts required to be prepared or retained pursuant to regulations of

the Interstate Commerce Commission or the provisions of the Interstate Commerce Act; (b) are not records of past transactions or historical facts; (c) are not in the same class as other materials and estimates submitted to the Commission as a part of the regular accounting and reporting procedures; and (d) are neither public documents nor documents furnished to the public.

2. Whether the petitioners, in seeking certiorari, may rely upon contentions that the decisions below have an adverse impact on the investigative powers of the Interstate Commerce Commission and disrupt the administrative practice of that agency when: (a) neither the proceedings below nor the decisions below involved the agency's general investigative authority, and the agency at no time invoked that authority in the manner prescribed by the governing statute; (2) the so-called administrative practice was first invoked in this proceeding, contrary to the agency's long-settled practice and its express interpretation of its own authority; and (3) the disruption is evidenced only by extra-record assertions demonstrating that the agency has sought to exercise such authority (apart from the acts involved in this proceeding) only after the courts below had ruled that such authority did not exist.

COUNTER STATEMENT OF THE CASE

1. The Background of the Proceedings

As noted in the petition (pp. 4-5), and detailed in the opinion of the Court of Appeals (App. B, pp. 14a-18a),[1] this "controversy had its origin in a hearing be-

[1] References to lettered appendices refer to appendices to the petition. Respondent's appendices are designated as "Appendix I" and "Appendix II." References to the appendix in the Court of Appeals, lodged with this Court by petitioners, are designated "C.A. App." in the brief and as "A" in quotations from the opinion of the court below.

fore the Subcommittee on Surface Transportation of the United States Senate", which was considering legislation to provide financial assistance to certain railroads (*id.* at 14a-15a).

In the course of that hearing, the Subcommittee Chairman asked Interstate Commerce Commissioner Tuggle to identify the railroads which might seek loan guarantees under such legislation, and to provide the Committee with financial data concerning the condition of those marginal railroads, including the financial forecasts of such railroads (*id.* at 15a-16a). Commissioner Tuggle, stressing that the Commission did not have the financial forecasts of railroads, agreed to request such data from the defendants, but noted that the railroads' response was beyond the Commission's control (*ibid.*)

The Commission, through its Bureau of Accounts, requested some 73 railroads—including all of the Class I railroads in the United States [2]—to furnish "a financial forecast . . . including an income statement and a cash flow statement projected forward to December 31, 1970 (App. B, p. 16a; App. C, p. 28a n. 1). Among the railroads receiving this request was Burlington Northern Inc., which the petitioners have conceded throughout these proceedings was neither a "marginal" railroad nor likely to apply for a loan guarantee (App. B, p. 16a; C.A. App., p. 88).

Burlington Northern responded to this request, setting forth some of the factors which precluded it from making an accurate forecast of the company's cash flow and income, and concluding with the general statement that Burlington Northern expected that its net income for 1970 "will be somewhat less than the *pro forma* earnings

[2] The 84th Annual Report of the Interstate Commerce Commission (1970), App. 6, Table I, p. 127, shows that there were 71 Class I railroads as of June 30, 1970.

of the constituent companies before special charges for the year 1969" and that "by the end of 1970 cash will be down somewhat from the amounts on hand at the beginning of the year but still at a level adequate for working purposes" (App. B, pp. 16a-17a; C.A. App., pp. 134-135).

The Commission rejected this response, demanding instead "actual pro forma-type statements detailing the items generally found in income and cash flow statements * * *" (App. B, p. 17a; C.A. App., pp. 136-137).

In the interim between the initial request and the demand for "pro forma-type statements," the Commission's Bureau of Accounts, through its director, petitioner Paolo, also requested information concerning Burlington Northern's then current dividend policy, noting dividend declarations in excess of earnings for the first two quarters of 1970 (App. B, p. 17a; App. C, p. 28a n. 1; C.A. App., pp. 128-129). Among the data Burlington Northern was asked to furnish were certain corporate records and, in addition, its cash flow and income forecasts, not only for 1970, but also for 1971.

Burlington Northern responded by supplying all of the materials requested, other than forecasts, and by offering to furnish current financial data on a monthly basis, if the Commission desired to receive it (App. B, p. 17a).[3]

---

[3] Included in the materials presented to Mr. Paolo was a chart comparing dividend payments and net income of the principal predecessor companies now comprising Burlington Northern—Northern Pacific, Great Northern, and Burlington—for the years 1959 through 1969 (C.A. App., p. 175). As this chart shows, it has been common for these carriers' quarterly dividend payments to exceed net income in the first part of the year. This was true of Great Northern in 1959-1963, 1965, and 1967-1969; of Burlington in 1960, 1968, and 1969; and of Northern Pacific in 1961-1963 and 1967-1969. The Commission never found it necessary to inquire into these dividend payments in any of these years.

[Footnote continued on page 5]

At the same time, Burlington Northern furnished to Mr. Paolo a lengthy opinion prepared by its Vice President-Law outlining the legal and practical objections to furnishing forecast data (C.A. App., pp. 23-39, 96, 139).

The Commission's response was to serve the "Formal Demand," set forth at page 18a of Appendix B to the petition. This demand differed from the earlier requests in that it covered not only the 1970 and 1971 cash flow and income forecasts, but also all working papers and interpretive materials, not only for those forecasts, but also for any uncompleted forecasts then in process, plus documents showing any variances between the 1970 forecast and actual performance, both monthly and by quarters.

The "Formal Demand" was premised entirely on Section 20(5) of the Interstate Commerce Act (App. A, p. 5a; App. B, pp. 17a-18a). As the District Court found, at no time did the Commission attempt to invoke its general investigative powers under Section 12 of the Act (49 U.S.C. § 12) or to proceed in accordance with those provisions (App. A, p. 12a).

The Commission provides no administrative procedures whereby a carrier may test the lawfulness or propriety of a demand issued pursuant to Section 20(5) (C.A. App., pp. 47, 51). Moreover, in the "Formal Demand" and throughout the proceedings below, petitioners have

---

[3] [Continued]

In view of the emphasis which petitioners have given to Burlington Northern's first and second quarter 1970 dividend payments in attempting to justify their conduct, Burlington Northern asked the Court of Appeals to take notice that for the year 1970, as shown in reports on file with the Interstate Commerce Commission, its consolidated net income for that year (in conformity with ICC accounting rules) was $34,202,000, and its dividend payments were $26,510,000, leaving a balance of consolidated retained earnings of $1,205,992,000. Its consolidated working capital at the end of 1970 was $35,220,000, down $18,414,000 from a year earlier (see C.A. App., pp. 134-135).

taken the position that Burlington Northern is subject to the statutory forfeiture of $500 per day provided by Section 20(7) (49 U.S.C. § 20(7)) in the event the demand is ultimately sustained, even though Burlington Northern acted expeditiously to secure judicial review of its rights (App. A, pp. 4a-6a; App. B, p. 14a).

2. The Decisions Below

In the District Court proceedings, the petitioners sought to justify their demand for forecast data primarily by contending that such data somehow fell within the scope of materials constituting accounting data subject to inspection in routine field examinations conducted under the authority granted by Section 20(5).

The District Court disposed of these intentions by finding that (App. A, p. 7a):

> (1) The forecast materials sought by the Formal Demand are not required to be prepared or retained by Burlington Northern pursuant to the regulations of the Commission or the provisions of the Interstate Commerce Act.
>
> (2) The forecast materials sought by the Formal Demand are not records of historical facts or past transactions but pertain to budget forecasts of Burlington Northern, including items relating to cash flow forecasts and income forecasts.
>
> (3) The budget forecasts, including income and cash flow forecasts, and associated documentary materials, sought by the Formal Demand are not in the same class as other materials and estimates submitted to the Commission by Burlington Northern Inc. and other carriers as part of their regular accouting and reporting procedures.
>
> (4) The forecast materials sought by the Formal Demand are not public documents and are not furnished to the public.

Dealing with the ICC's contention that such forecast materials had previously been provided to the Commission pursuant to inspections conducted under Section 20 (5), the District Court found (App. A, pp. 7a-8a):

> "The affidavits submitted by Burlington Northern Inc. and executed by accounting officers of Burlington Northern Inc., the accounting officers of two of its subsidiaries, the Colorado and Southern Railway Company, and the Fort Worth and Denver Railway Company, and accounting officers of two nonaffiliated railroads, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Southern Railway System, each state that to affiant's knowledge these railroads (and the predecessors of Burlington Northern Inc.) have not been requested to furnish, and have not furnished, to auditors employed by the Commission budget forecasts, including income and cash flow forecasts of the kind sought in the Formal Demand. The reply affidavit on behalf of defendants states, with respect to each of these railroads, that although all aspects of the present request may not have been covered in the past, *it is probable that* some requests for budget forecasts and cash flow forecasts were made in the normal course of field examinations of the accounting records of these carriers, that such requests would be made to the people who retain or maintain such records, and would not necessarily be brought to the attention of accounting officers. On the basis of these affidavits, although forecast materials may have been furnished to auditors employed by the Commission in the course of field examinations, *if this was done* it was not pursuant to an official request or demand by the Commission and was not done with the authorization or knowledge of the responsible accounting officers of the railroads" (emphasis supplied).

After reviewing the language of Section 20(5), the prior judicial construction of that section, the amendments to the Section and the legislative history of those

amendments (discussed more fully below), the District Court stated (App. A, pp. 11a-12a):

> "To bring the materials sought in the Formal Demand within the scope of amended Section 20(5), they would have to be deemed 'other documents' within the meaning of that section since these forecasts clearly are not 'accounts, books, records, memoranda [or] correspondence.' In the light of the Supreme Court's interpretation of Section 20 set forth in the *Louisville & Nashville* case, *supra*, and the legislative history surrounding the subsequent amendments to the Act, and the general context of the section, the Court concludes that the amendment of Section 20(5) did not expand the inspection powers of the Commission to categories of documents not related to the prescribed or authorized accounting and corporate records of a carrier, and that the term 'other documents' means other documents providing background material which would assist an auditor to understand an entry on the records prescribed by the Commission (see 49 C.F.R. Part 1201, General Instructions 1-3). Accordingly, Section 20(5) does not authorize the Interstate Commerce Commission to inspect the budget forecast materials described in the Formal Demand."

In the Court of Appeals, the petitioners adopted both the position that the forecast materials requested were materials which could be demanded under a conventional view of Section 20(5), as related to the uniform system of accounts, and the position adopted here, that such materials were subject to inspection even though they bore no relation to the uniform system of accounts (Petition, pp. 7, 11).

The Court of Appeals noted that this Court had held that "the purpose of section 20 was to establish a uniform system of accounting and bookkeeping, not to grant unlimited power of inspection to the Commission" (App. B, p. 23a). If found that subsequent amendments to the

Section, considered in light of their legislative history had not changed the purpose of the Section:

> "That purpose is to maintain a uniform accounting system and to permit the analysis and interpretation of records which are required to be kept by carriers" (App. B, p. 26a).

Interpreting the Commission's authority in light of the statutory purpose, the Court held (App. B, p. 26a):

> "The Commission's access to memoranda and other materials in the possession of carriers must therefore be confined to circumstances in which the need for information relating to or explanatory of required accounting or bookkeeping entries is evident. The Commission's powers of inspection are focused upon facts and historical data as reflected in the records; they do not extend to projections or predictions of future events which have no apparent relevance to the understanding or evaluation of accounting and bookkeeping entries."

Summing up, the Court held (App. B, p. 26a):

> "The budget and income forecasts demanded by the Commission here relate to events which might or might not occur in the future, as distinguished from facts and past events recorded in the books and records of the carriers. Such prognostications are not within the limited scope of the Commission's power of inspection under Section 20."

In the proceedings below, a substantial part of the argument was devoted to two basic issues which neither court below found it necessary to discuss in view of their resolution of the basic issue of statutory construction. These issues were (1) the substantial problems arising under the securities laws from the disclosure of forecast data; and (2) the constitutional infirmities of Section 20 if construed as petitioners contend it should be.

Since both of these issues must be considered in the event this Court decides to review the decisions below, the portions of the Burlington Northern brief to the Court of Appeals dealing with these questions have been set forth as Appendices I and II to this brief in opposition to the petition.

REASONS FOR DENYING THE WRIT

1. The Decisions Below Have No Bearing Whatsoever On The Scope Of The Commission's Investigative Powers

In an obvious effort to capture the attention of this Court, petitioners assert that somehow the decisions below have a serious and adverse impact on the investigative powers of the Interstate Commerce Commission. Only if this Court is willing to rewrite the Interstate Commerce Act by repealing Section 12, the provision which establishes and governs the Commission's investigative function, and to repudiate its own decisions, which have defined the function and scope of Section 20, without dissent, for more than 60 years, can it consider this contention seriously.

The Commission's investigatory power is established by Section 12 of the Interstate Commerce Act (49 U.S.C. § 12), not by Section 20(5). In relevant part, Section 12 provides:

> "(1) The Commission shall have authority in order to perform its duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this chapter . . . and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers . . . such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time

such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. The Commission is authorized and required to execute and enforce the provisions of this chapter . . . and for purposes of this chapter the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

* * * *

"(2) Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any Court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section."

The subjects for which petitioners contend they sought the financial forecast data here in question—"in connection with proposed legislation to deal with financially troubled railroads" and in relation to the Burlington Northern's interim dividend policy (Petition, p. 8)—were, if to be considered by the Commission at all, appropriate subjects for consideration in a proceeding under Section 12.

The Commission, however, for reasons best known to itself, has refused to proceed under Section 12. As the District Court found (App. A, p. 12a):

"Neither the demand [served on Burlington Northern] nor the counterclaim filed by the United States [seeking to impose statutory forfeitures on Burlington Northern for refusing to comply with the demand] purport to rely on Section 12(1)."

Whether or not the Commission may obtain forecast data in a proceeding under Section 12, instituted to enforce provisions of the Act or in relation to proposed legislation, has not been tested in this proceeding, for the simple reason that the Commission chose not to rely upon that authority. Instead, the Commission chose to rely upon Section 20(5), which has no relation to general enforcement of the Act or proposed legislation.

As this Court held in 1915, when the Commission first sought to expand its investigatory and legislative powers by invoking Section 12 to justify exceeding the limits of Section 20:

> "Section 12 deals with the production of evidence in certain cases; it does not make provision for inspections by examiners duly authorized by the Commission. That feature of the law was added by the amendment at § 20. . . ." (*United States* v. *Louisville & Nashville R. Co.*, 236 U.S. 318, 329-330 (1915)).

In these circumstances, therefore, the question in this case must be limited to determining whether the production sought is justified by the terms of Section 20, not by reference to the general investigatory powers of the Commission (*ibid.*) Conversely, the decisions below have no relevance to the scope of the Commission's general investigatory power, and the Court, in evaluating the petition, should ignore the argumentative assertions at pages 7-8 and 10-11 of the petition.

The existence of Section 12 of the Act also largely disposes of the "Statement of Circuit Judge Leventhal, in which Chief Judge Bazelon, and Circuit Judges Wright and Robinson join, as to Why He Would Grant Suggestion for Rehearing En Banc" (App. C).

Faced with the same obfuscating contentions as those presented to this Court in the petition, and without the benefit of a response to the petition for rehearing *en banc*

(Rule 40(a), Fed. Rules of App. Proc.), Judge Leventhal was misled into assuming that this proceeding involved the Commission's power to investigate, rather than its authority to demand a routine inspection of corporate documents (App. C, pp. 28a-29a). Nevertheless, Judge Leventhal stated (*ibid.*):

> "Looking at the question broadly and prima facie, it seems to us likely that the ICC has authority to conduct an investigation when railroads are paying out dividends in excess of current earnings, and to examine the carriers' earnings and cash flow forecasts—at least where, as here, there is a context of proposals under consideration for legislation to make loan guaranties to the railroad industry as one beset by financial strains. We do not say that the authority may be exercised routinely. The items involved are internal papers that stand at the heart of management effort, and so long as our carrier operations are rooted in private enterprise there is a strong element of privacy in such items. That is, however, a reason for limiting the occasion of such production—by agency or judicial limitation —and for forbidding its disclosure outside the agency except under careful conditions subject to court review. It is not a basis for a decision finding the ICC totally without power to call for and study such critical documents."

Judge Leventhal's Statement is a reason for denying, not a reason for granting review of the decisions below.

The petitioners do not seek a procedure which (1) limits the occasion for production of forecast data or (2) permits, let alone requires, judicial or agency limitation upon either the scope or the disclosure of the investigation. To the contrary, by attempting to substitute Section 20(5) procedures for the procedures specified in Section 12, they seek to force disclosure of forecast data:

(1) routinely, and without limitation by agency or court; and

(2) under circumstances where there are neither agency nor court procedures for limiting disclosure.

If the Commission had invoked its investigatory procedures under Section 12, it is likely that this litigation would never have arisen. Under those procedures, Burlington Northern would have had an opportunity to demonstrate (1) that its forecasts were wholly irrelevant to consideration of the financial needs of "marginal railroads," or, alternatively, that (2) any disclosure of its forecast data to the Commission staff should be conditioned upon the effective maintenance of the confidentiality of such data (see Appendix I).

Under Section 20(5), as construed by petitioners, Burlington Northern's options were (1) to comply, regardless of its view of its legal rights, or (2) face the imposition of forfeitures of $500 per day while it sought to vindicate those rights.

Had Judge Leventhal had the benefit of a reply to the petition for rehearing *en banc*, it is fair to assume that, rather than recommending rehearing, he would have directed the Commission's attention to its general investigatory powers, which, for reasons they fail to disclose, petitioners are determined to ignore.

2. There Is No Established Administrative Procedure Which The Decision Below Could Disrupt

Petitioners assert (Petition, p. 11) that:

> "Section 20(5) has long been the principal basis for routine Commission investigations concerning numerous aspects of the railroad industry, which frequently are unrelated to the uniform accounting system specified by the Commission."

There is not a scintilla of evidence in the record to support this assertion.

To the contrary, the record demonstrates that, prior to the acts giving rise to this proceeding, the Commission has limited its field examinations to accounting data, and has not attempted to secure forecast data, let alone to cover the entire field of its regulatory authority under the guise of a Section 20(5) audit.

In its verified complaint (C.A. App., p. 19), Burlington Northern stated:

> "Plaintiffs are informed and believe that the demand made upon them is wholly unprecedented."

Further investigation in preparing for trial confirmed that information and belief (C.A. App., pp. 139-140, 146). As counsel for the Interstate Commerce Commission conceded in response to an inquiry from the District Court (C.A. App., pp. 4-5), the Commission has never before made a formal request for data of the kind sought by the "Formal Demand" (C.A. App., pp. 106-107).

Although the principal carriers now comprising Burlington Northern were subjected to 23 field examinations over the past twenty years (C.A. App., p. 143), and its two smaller subsidiaries were examined an additional 20 times since 1952 (App., pp. 148-149), not once did the Commission's examiners attempt to engage in a review of budget and forecast data of the kind now sought, and which the Commission would have this Court believe is "routine" (C.A. App. 139-140, 151-152, 155-156).

Nor is this absence of any review of such data limited to the lines now comprising Burlington Northern (C.A. App., pp. 162-163—Chicago, Milwaukee, St. Paul and Pacific Railroad; C.A. App. 157-158—Southern Railway System). As the trial court found (C.A. App., pp. 106-107):

> ". . . although forecast materials may have been furnished to auditors employed by the Commission

> in the course of field examinations, if this was done it was not done pursuant to an official request or demand by the Commission and was not done with the authorization or knowledge of the responsible officers of the railroads."

Any contention now made that forecast materials have in the past been routinely furnished by carriers to the Commission is squarely contradicted by Commissioner Tuggle's statements to the Senate Subcommittee that "We can't give the railroads' forecast," "We don't have their financial forecasts," and "We don't know what their financial forecasts are. They don't file them with us" (C.A. App., pp. 116, 117).

The extra-record list of alleged demands for forecast data—and the alleged refusals of carriers to provide such data—(App. E to Petition) is noteworthy only in that it demonstrates that the Commission apparently entered into a course of demanding such data under the guise of Section 20(5) commencing with the District Court's ruling that such a demand was outside the Commission's statutory authority. Of the 17 examples cited in Appendix E, all of the demands were made after the decision of the District Court, and 8 were made after that decision was affirmed by the Court of Appeals. As the District Court found (App. A, pp. 7a-8a), no such demands were made prior to the demand giving rise to this proceeding.

The Commission's motive in engaging in the conduct described in Appendix E seems clearly to have been intended to create an "established administrative practice" *ex post facto* in aid of its contentions in this proceeding.

3. The Decisions Below Are Clearly Correct

Section 20(5) of the Interstate Commerce Act authorizes the Interstate Commerce Commission to prescribe the forms of accounts to be maintained by car-

riers, prohibits carriers from keeping any accounts, records or memoranda not authorized by the Commission, and permits the Commissition to designate examiners to inspect and copy "any and all accounts, books, records, memoranda, correspondence, and other documents, of such carriers . . ." (49 U.S.C. § 20(5)).

Both courts below, after full consideration of the statutory language, the legislative purpose, the legislative history, and the established administrative interpretation of this section have concluded that the inspection thus authorized is limited to documentary materials related to the prescribed or authorized accounting and corporate records of a carrier, including all documents which would assist an auditor to understand an entry in such records (App. A, pp. 11a-12a; App. B, pp. 25a-26a).

Petitioners would have this Court adopt a contrary view and construe this provision to include not only the historic accounting data which the Commission requires or permits carriers to maintain and preserve, and the documentary materials which provide a foundation for or explain such records, but also "any and all" documents of regulated carriers (Petition, pp. 7-8), whether or not they are related to the accounting system. Only by means of this extreme interpretation can they justify the demand for budget and cash flow forecast data at issue here.

Wholly apart from the serious constitutional problems which would arise if petitioners' construction of the Section were adopted (see Appendix II),[4] petitioners'

[4] In *United States* v. *Witkovich*, 353 U.S. 194, 199, 201 (1957) this Court stated that in construing a statute

> ". . . once the tyranny of literalness is rejected, all relevant considerations for giving a rational content of the words become operative. A restrictive meaning for what appears to be plain words may be indicated by the Act as a whole, by the persuasive gloss of legislative history or by the rule of constitutional adjudication . . . that such a restrictive meaning must be given if a broader meaning would generate constitutional doubts."

contentions as to the meaning of Section 20(5) are plainly wrong.

It is a familiar policy in the construction of the terms of a statute to take into consideration the meaning naturally attaching to them from the context, and to adopt that sense of the words which best harmonizes with the context. See, *e.g.*, *United States* v. *Raynor*, 302 U.S. 540, 547-48 (1938). The words "any and all accounts, books, records, memoranda, correspondence, and other documents" appear in the context of a section authorizing the Interstate Commerce Commission to prescribe the forms of "any and all accounts, records, and memoranda" of the movement of traffic and the receipts and expenditures of money which may be kept by carriers (49 U.S.C. § 20(5)). The meaning naturally attaching to the words "books, . . . correspondence, and other documents," used in series with the words "accounts, . . . records, and memoranda" in this context, is that these words refer to books, correspondence, and other documents related to the prescribed or authorized system of accounts. See *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307 (1961); *Polaroid Corporation* v. *Commission of Internal Revenue*, 278 F.2d 148, 152 (1 Cir. 1960).

The interpretation of Section 20(5) dictated by the statutory language, and adopted by the courts below, is also embodied in the Commission's own regulations. 49 C.F.R. Part 1201, General Instructions, states:

> "1-3 Records. (a) Each carrier shall keep its books and account, and all other books, records and memoranda which *support the entries in such books of account* so as to be able to furnish readily full information as to any item included in any account.
>
> Each entry shall be supported by such detailed information as will permit ready identification, analysis, and verification of all facts relevant thereto.

> "(b) The books and records referred to herein include not only accounting records in a limited technical sense, but all other records, such as minute books, stock books, reports, correspondence, memoranda, etc., which *may be useful in developing the history of or facts regarding any transaction.*" (Emphasis added.)

Thus, it is evident that the Commission's regulations include within the scope of Section 20(5) only those documents required to be kept as part of the Uniform System of Accounts or authorized by 49 C.F.R. § 1200.1, or necessary to develop "the history of or facts regarding any transaction."

Petitioners' contentions that the statute should be given a different interpretation are entitled to no weight in the face of the Commission's own regulations. *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956); *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 209 F. Supp. 35, 41-42 (N.D. Ill. 1962).

When Congress enacted that portion of the Hepburn Act which is now Section 20(5), its purpose was to give

> ". . . the Commission power, in its discretion, to prescribe the form of accounts, records, and memoranda to be kept by carriers, and that the Commission shall at all times have access to such records or books and other accounts to be kept." House Report No. 591, 59th Cong., 1st Sess. (1906), pp. 5-6.

In *Harriman* v. *Interstate Commerce Commission*, 211 U.S. 407 (1908), Justice Holmes, construing Section 20 as amended by the Hepburn Act, (211 U.S. at 421-422) stated:

> "It seems to us plain that . . . [Section 20] is directed solely to accounts and returns. . . ."

And, in *United States* v. *Louisville & Nashville Railroad Company*, 236 U.S. 318, 332-333 (1915), this Court stated:

> "Of course, this act, like other acts, may be read in the light of the purpose it was intended to subserve and the history of its origin. We find, then, that in this section Congress has authorized the Commission to prescribe the forms of accounts, records, and memoranda, which shall include accounts, records, and memoranda of the movements of traffic, as well as the receipts and expenditures of money, to which accounts, records, and memoranda the Commission is given access at all times.:

The Court refused to interpret the statute to reach documentary materials not related to accounts or records (236 U.S. at 336), or to expand the scope of the Commission's inspection powers in light of the general powers conferred upon the Commission by Section 12 (236 U.S. at 329-330):

> "Section 12 deals with the production of evidence in certain cases; it does not make provision for inspection by examiners duly authorized by the Commission. That feature of the law was added by the amendment of § 20, of June 29, 1906."

In the *Louisville & Nashville* case, the Supreme Court held that Section 20(5), as it then stood, did not give the Commission representatives access to carrier correspondence, even though such correspondence "may contain a record, and it may be the only record of business transactions . . ." (236 U.S. at 336). Following that decision, the Commission recommended in its annual reports for 1915, 1916 and 1917:

> "That that portion of section 20 of the Act which accords the Commission rights of access to the accounts, records, memoranda kept by carriers be amended so as to also accord right of access to the carriers correspondence files."

The Congress responded to the Commission's request in the Transportation Act of 1920 and amended Section 20(5) by adding the words "including all documents, papers, and correspondence" to the earlier language involved in the *Louisville & Nashville* case, *i.e.*, "accounts, records, and memoranda." The intended scope of this amendment was stated precisely during the House Hearings on H.R. 4378, 66th Cong., 1st Sess. (1919) p. 33, which became the 1920 Act, as follows:

> "[Commissioner] Clark. * * * It will give the Commission the same access to the correspondence files of the carriers subject to its inspection as it now has with regard to accounts, records, and memoranda.
>
> "The Chairman. Is that a result of the decision of the Supreme Court in the Louisville Nashville case?
>
> "Mr. Clark. Yes. * * * It has developed in many instances that an understanding of transactions which appear on the books of a carrier, the true facts as to an expenditure and the justification and warrant for it under the law, cannot be found unless the correspondence which passed in connection with it is reviewed."

The report of the House Committee on Interstate and Foreign Commerce on this amendment states (H. Rep. No. 456, 66th Cong., 1st Sess., p. 30 (1919):

> "Section 433 [of H.R. 10453] amends section 20 of the commerce act so as to include, within the provisions relating to the keeping of accounts and the prohibition against destroying or mutilating them, all documents, papers and correspondence required to be kept by the carriers. This amendment is necessary in view of the decision of the Supreme Court that existing law does not authorize the Commission to examine correspondence. * * *"

Several things are evident from this legislative history. First, the specific purpose of the 1920 amendment was to undo the holding in Louisville & Nashville that the Commission was limited to inspection of formal carrier records, and lacked authority to examine correspondence and other informal documents which record or explain transactions. Secondly, the amendment was designed to give the Commission adequate power to ascertain "the true facts" as to carrier "transactions". There was not even the slightest suggestion that the amendment to Section 20(5) was intended to give the Commission access to documentary materials wholly unrelated to the system of accounts, and certainly no indication that it was broadening the inspection powers to include projections reflecting management's tentative assumptions concerning plans and hopes for the future.

Similarly, the 1940 Amendment to Section 20(5) was not intended to change the nature or scope of the inspection permitted, but merely to make it applicable to the records of persons controlling or controlled by carriers (App. B, pp. 24a-25a)

In the light of all of the foregoing factors, the construction of Section 20(5) adopted by the courts below is clearly correct.

CONCLUSION

Since the decisions below reflect a proper interpretation of the scope of the inspection powers granted by Section 20(5), and neither limit the Commission's investigation powers under Section 12 nor disrupt any legitimate administrative practice of the Commission, no useful purpose would be served by further review of this

proceeding. Accordingly the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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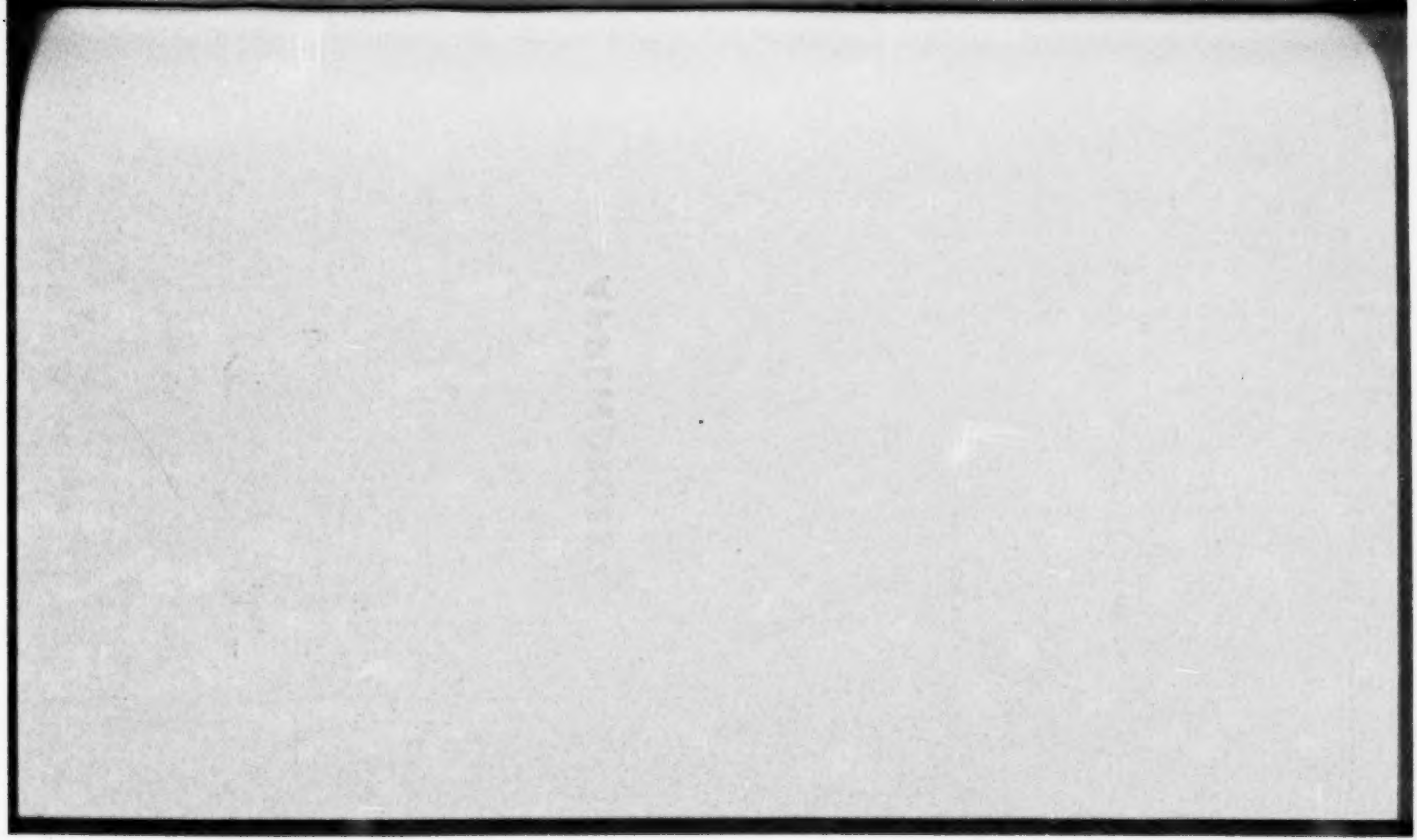
APPENDICES



APPENDIX I

Excerpt from Respondent's Brief to Court of Appeals Re Disclosure of Forecast Data:

III. The Problems Inherent in the "Formal Demand"

The data demanded by the Interstate Commerce Commission in the "Formal Demand For Examination of Records", served November 18, 1970, at the behest of Mr. Paolo, consists entirely of forecasts and data related to forecasts. Burlington Northern's resistance to the Commission's demand for these cash flow and income forecasts stems from the nature of the forecasts themselves, and from the practical and legal problems which may arise from the submission of such confidential data to the Commission under circumstances which, far from guaranteeing its confidentiality, practically insure its disclosure.

Forecasts, while a useful tool for management in making and revising plans, are at best educated guesses concerning the future. In the hands of one who does not understand the "tentative subjective quality of these forecasts, their unique limited distribution and use, the fact that as a management tool they become obsolete almost immediately upon issuance and the fact that by their nature forecasts must be explained as to the underlying assumptions not revealed on their face in order not to be completely misleading" (App. p. 25), they are, as Mr. Ernzen has characterized them, "inherently misleading" (App. p. 146).

No one can guarantee the accuracy of a forecast. Not only are there many imponderables involved in forecasting (App., pp. 134-135), and unpredictable events (App., pp. 145-146), "the preparation of a forecast may itself result in drastic changes in the assumptions upon which it is based" (App., p. 145).

The American Institute of Certified Public Accountants has flatly stated in its Code of Professional Ethics (Rule 2-04):

> "A member or associate shall not permit his name to be used in conjunction with an estimate of earnings based upon future transactions in a manner which may lead to the belief that the member or associate vouches for the accuracy of the forecast."

It is for reasons such as these that Burlington Northern's forecast data is "distributed in confidence only to the high levels of management who are responsible for effecting changes in plans and procedures for Burlington Northern" (App., p. 25). Furthermore, the major assumptions on which these forecasts are based, culled from the responses of the many employees who supply data (App., pp. 24-25), are disclosed only to the Chairman and President of Burlington Northern (App., p. 145). Clearly, the disclosure of certain of those assumptions, as for example estimated, but unnegotiated, wage increases, could be injurious to Burlington Northern in the conduct of its business.

The Commission does not offer to maintain the confidential status of the forecasts demanded, but, to the contrary, has announced in advance its intention to transmit them to Congress (App., p. 134), where neither Burlington Northern nor the Commission itself has any control over their disclosure to the world at large, or perhaps more importantly, to a selected few.

Section 20 of the Interstate Commerce Act did not contemplate unrestrained disclosure of even the historical, factual accounting data which it clearly authorizes the Commission to examine. Section 20(7) (f) makes it a misdemeanor for a Commission examiner to disclose any fact or information acquired during an inspection, except as authorized by the Commission or a court.

In the present circumstances, however, Burlington Northern cannot rely upon these minimum guarantees of Section 20(7) (f). Section 20(7) (f) by its terms authorizes disclosure upon direction of the Commission, and the Commission has already committed itself to divulge these budget forecasts to Congress (App., pp. 118-119).

Moreover there is substantial doubt as to the Commission's ability to protect these confidential forecasts from the public, even if it showed some inclination to do so.[5]

This lack of control over the disclosure of this data creates potential legal problems, as well as practical problems, for Burlington Northern. In *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 860-61 (2 Cir. 1968), the Court stated:

> ". . . Congress intended [in the Securities and Exchange Act] to protect the investing public in connection with their purchases or sales on Exchanges from being misled by misleading statements promulgated for or in behalf of corporations irrespective of whether insiders contemporaneously trade in the securities of that corporation and irrespective of whether the corporation or its management have an ulterior purpose or purposes in making an official public release." See *Heit* v. *Weitzer*, 402 F.2d 909, 913 (2 Cir. (1968)).

The Court further stated (401 F.2d at 862):

> ". . . we hold that Rule 10b-5 is violated whenever assertions are made, as here, in a manner reason-

[5] The Commission itself has not promulgated any rules which deal with disclosure or non-disclosure of confidential data (App., p. 37). There is thus no real foundation for invocation of the exception from the disclosure requirements of the Public Information Act (5 U.S.C. § 552) for "commercial or financial information obtained from a person and privileged or confidential" (5 U.S.C. § 552 (4) (b) (4)).

> ably calculated to influence the investing public . . . if such assertions are false or misleading or are so incomplete as to mislead irrespective of whether the issuance was motivated by corporate officials for ulterior purposes."

Violations of Rule 10b-5 give rise to liability for damages to investors injured thereby.

There can be no doubt that management income and cash flow forecasts are the kind of data "reasonably calculated to influence the investing public". See, *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, Sec. Ex. Act Release No. 8459, CCH Fed. Sec. L. Rep. (1966-1969 Transfer Binder), ¶ 77,629 at p. 83,349-50. And the Securities and Exchange Commission has consistently ruled such forecasts out of the prospectuses and reports filed with that Commission (SEC: Disclosure to Investors—A Reappraisal of Administrative Policies Under the '33 and '34 Acts ("The Wheat Report"), pp. 95-96) and out of proxy materials on the ground that such projections and predictions are inherently misleading.

As the Court stated in *Union Pacific R. Co.* v. *Chicago and North Western Ry. Co.*, 226 F. Supp. 400, 408-409 (N.D. Ill. 1964), dealing with the use of forecasts of railroad earnings in a proxy solicitation:

> "The [Securities and Exhange] Commission's Rule 14a-9 offers 'predictions as to specific future market values, earnings, or dividends' as its first example of what may be false or misleading. There is good reason for this emphasis on prediction. Bold statements contrary to concrete and historic facts run the risk of ready refutation and exposure, and to that degree are self-policing. Predictions, estimates, and opinions are more elusive and may present graver dangers of misleading the investing public. They lend themselves to this evil by allowing facts to be suggested or implied without direct statement. Even if they do not tend to induce belief in

> any particular fact, they nonetheless impart the existence of unspecified facts which support the conclusion. The shareholder may be ready to assume contrary to fact, that the predictor has special knowledge or unique information to bear out fully his prediction, and be induced to rely upon a supposed expert judgment of the mysteries of finance. 'Such an expert can speak with authority only as to subjects upon which he has professional knowledge and since no engineering course or other professional training has ever been known to qualify anyone as a clairvoyant, attempts by companies to predict future earnings on their own or on the authority of experts have almost invariably been held by the Commission to be misleading because they suggest to the investor a competence and authority, which in fact does not exist.' Heller, Disclosure Requirements Under Federal Securities Regulation, XVI The Business Lawyer 300, 307 (1961). * * *"

Burlington Northern knows of no way to insure that budget and cash flow forecasts of the kind demanded by the Commission will not be "so incomplete as to mislead." This is particularly true of the tentative and incomplete segments of future forecasts not yet completed which the Commission seeks in paragraph 3 of its demand (App., pp. 146-147).

While it is not clear that Burlington Northern would be subject to liability for inherently misleading statements furnished to the Commission pursuant to a lawful demand, and released by the Commission and not by Burlington Northern (*cf. Norsul Oil and Mining, Ltd.* v. *Texaco, Inc.*, 309 F. Supp. 1242 (SDNY 1970)), it is equally unclear that these factors would insulate it.

And, even if Burlington Northern were not subject to liability for the initial release of confidential forecasts to the Commission, its problems would not be at an end. As the Court noted in the *Texas Gulf Sulphur* case (401 F.2d at 848):

> ". . . Rule [10-b-5] is based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information . . . ."

The New York Stock Exchange, in its statement on timely disclosure, published July, 1968, has stated:

> "A company should not give information to one inquirer which it would not give to another."

And the New York Stock Exchange Manual (p. A-19) clearly shows that a corporation must make a public disclosure of all material information the security of which cannot be assured:

> ". . . fairness requires that the Company make an immediate public announcement as soon as confidential disclosures relating to such important matters are made to 'outsiders'."

By these standards, furnishing forecasts to the Commission under circumstances which virtually insure they will not be held in confidence might well require Burlington Northern itself to release the same data to the public.

Other problems arise because Burlington Northern updates its current annual forecasts monthly (App., p. 11), and the changes may be substantial (App., p. 109). If it furnishes its preliminary 1971 forecasts to the Commission under circumstances where there is no assurance of confidential handling, it might well also be required to publicize each updating which reflects any material change. A corporation's failure to issue a public statement that prior information disseminated to the public has become inaccurate can give rise to a cause of action under Rule 10b-5. See, *e.g.*, *Fischer* v. *Kletz*, 266 F. Supp. 180 (SDNY 1967); *SEC* v. *Sattuck Denn Mining Corp.*, 297 F. Supp. 470 (SDNY 1968); *Sprayregan* v. *Livingston Oil Co.*, 295 F. Supp. 1376 (SDNY 1968)

(dealing specifically with earnings projections rendered erroneous by a change in circumstances).

The fact that Burlington Northern or corporate "insiders" were neither taking advantage of shifts in forecasts, nor acting for any reason other than to satisfy the Interstate Commerce Commission's demands, would not relieve them of responsibilities or liabilities under these policies of the securities laws.

APPENDIX II

Excerpt from Respondent's Brief to Court of Appeals Re Constitutional Issues:

II. The Construction of Section 20 Urged By Appellants Would Render the Statute Unconstitutional

Appellants seek to reverse the order of the District Court granting Burlington Northern's motion for summary judgment and denying their own. Although appellants are not explicit in stating the precise scope of the relief they seek, it should be noted that in their motion for summary judgment, they sought both an order compelling the production of the documents described in the "Formal Demand" and the imposition of a forfeiture of $500 per day from November 18, 1970, to the date of compliance with the demand.[13]

Both aspects of the requested relief present substantial constitutional issues which were not reached by the District Court, in view of that Court's construction of Section 20(5) (App., p. 110). Appellants' request for reversal of the District Court's decision brings these issues to the forefront again, however, and requires that they be considered by this Court in passing on the appeal.

If Section 20(5) were to be given the sweeping interpretation which the appellants seek, it would mean that every piece of paper in a carrier's possession would be subject to inspection by the Commission without court order and merely by making a demand for its production.

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[13] It should be noted that appellants' motion, unlike Burlington Northern's motion, did not rest on undisputed facts (see App., pp. 64-79; 107). Accordingly, in light of the appellant's assertion that the disputed facts are material to their motion (App., p. 68), there is no basis upon which appellants' motion could be granted. Rule 56(c), Fed. Rules of Civil Procedure. If appellants should prevail on appeal, the Court's only course would be to remand the proceedings for trial.

It would mean that a refusal to comply with such a demand could result in penalties of up to $500 per day. As discussed more fully below, such a far-reaching and broad interpretation would render Section 20(5) unconstitutional as a warrantless search prohibited by the Fourth Amendment (*See* v. *City of Seattle*, 387 U.S. 541 (1967)), and violate the due process clause of the Fifth Amendment.

In *United States* v. *Witkovich*, 353 U.S. 194, 199, 201 (1957) the Supreme Court stated that in construing a statute

> ". . . once the tyranny of literalness is rejected, all relevant considerations for giving a rational content of the words become operative. A restrictive meaning for what appears to be plain words may be indicated by the Act as a whole, by the persuasive gloss of legislative history or by the rule of constitutional adjudication . . . that such a restrictive meaning must be given if a broader meaning would generate constitutional doubts."

In this case, if Section 20(5) is construed as appellants contend it should be, there is far more than a "serious doubt"; Section 20(5) would be clearly unconstitutional. The constitutional considerations dictate, therefore, that appellants' construction of Section 20(5) be rejected, and that of the District Court affirmed.

a. *The Formal Demand For Examination of Records Violates the Fourth Amendment*

The Supreme Court has declared that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967); *Mancusi* v. *DeForte*, 392 U.S. 364, 370-71 (1968). The ques-

tion in this case is whether the warrantless search which the Commission's auditors were attempting to conduct under the "Formal Demand" falls within any "specifically established and well-delineated" exception to the general rule that searches conducted outside the judicial process are *per se* unreasonable under the Fourth Amendment. See *Chimel* v. *California*, 395 U.S. 752, 762 (1969); *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968); *Camera* v. *Municipal Court*, 387 U.S. 523, 528-29 (1967). The burden rests on the government "to show the existence of such an exceptional situation." *Vale* v. *Louisiana*, 399 U.S. 30, 34 (1970). Failure to comply with the warrant requirement can only be excused by "exigent circumstances." *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968).

In *See* v. *City of Seattle*, 387 U.S. 541 (1967), the Supreme Court carefully explained the application of the Fourth Amendment to warrantless searches conducted by administrative agencies. The Court noted that an investigative entry by an administrative agency might permit "inspection of the structure in which a business is housed, as in this case, or inspection of business products, or a *perusal of financial books and records*." *Id.* at 544 (emphasis added). However, "warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises." *Ibid.* As the Court clearly stated at 544-45:

> "The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the demand prior to suffering penalties for refusing to comply.

> "It is these rather minimal limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments. * * *"

See also, *Finn's Liquor Shop, Inc.* v. *State Liquor Authority*, 24 N.Y. 2d 647, 301 N.Y.S. 2d 584, 249 N.E. 2d 440 (1969), cert. denied 396 U.S. 840 (1969); *Roberts* v. *Whitaker*, 178 N.W. 2d 869 (Minn. 1970).

The standards set forth in the *See* case are applicable to Federal as to state administrative agencies. In *United States* v. *Stanack Sales Co.*, 387 F.2d 849 (3rd Cir. 1968), involving a Food and Drug Administration inspection of financial data, the court held that there was no special exemption from Fourth Amendment protection as to business records and that the corporate records could be obtained only by the procurement of a search warrant or a carefully delineated administrative subpoena. *Id.* at 852.[14] See also *United States* v. *Kramer Grocery Co.*, 418 F.2d 987 (8th Cir. 1969); LaFave, *Administrative Searches and the Fourth Amendment*, 1967 Supreme Court Review 1, 31; Lipton, *Constitutional Rights In Criminal Tax Investigations*, 45 F.R.D. 293, 328 (1968).

There are some Supreme Court cases which indicate an exception for records required to be kept by law and held subject to public inspection; these are said to be in the nature of quasi-public documents which may be inspected in the absence of judicial process. See, *e.g.*, *Davis* v. *United States*, 328 U.S. 582, 587-90 (1946); *Wilson* v. *United States*, 221 U.S. 361, 380 (1911); *Boyd* v. *United States*, 116 U.S. 616, 623-24 (1896). In the *Wilson* case, the Supreme Court said that this principle applies to "records required by law to be kept in order that there may be suitable information on transactions which are

[14] The Food and Drug Administration has announced that in view of the *See* case, it will in the future request warrants from a judge. FDA Release, June 18, 1967.

the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." 221 U.S. at 380.

Whatever may be the validity of such a distinction in the light of recent Supreme Court cases like *See* v. *City of Seattle*,[15] it is clear that the materials which the Interstate Commerce Commission requested in this case are private papers which are not required by law to be made or kept so that there may be suitable information on transactions subject to regulation. No regulation of the Interstate Commerce Commission requires the Burlington Northern to prepare or retain budget forecasts (see 49 C.F.R. Part 1200), and these forecasts do not provide "information on transactions".

In short, the "Formal Demand" does not fall within a "specifically established and well-delineated" exception to the rule that searches conducted outside the judicial process are *per se* unreasonable under the Fourth Amendment.

b. *Section 20(7) of the Interstate Commerce Act, as Construed by the United States in its Counterclaim, Violates the Due Process Clause of the Fifth Amendment.*

In addition to the constitutional issues raised by the Formal Demand itself, there are serious questions which arise as a result of the methods provided to enforce such a demand.

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[15] In the *See* case, the Supreme Court stated that *Davis* v. *United States*, 328 U.S. 582 (1946) "did not involve a search warrant issue." 387 U.S. at 545 n.7. In *Mancusi* v. *DeForte*, 392 U.S. 364 (1968), the Supreme Court referred to the remarks about public records in the *Davis case as "dicta"*. 392 U.S. at 372 n. 11. The Court added that "the only holding in *Davis* was that there had been a valid consent to the search." *Ibid.* See also *Chimel* v. *California*, 392 U.S. 752, p. 761 n. 5 (1969).

In paragraph 4 of its counterclaim (App., p. 54) the United States asserted that plaintiffs are liable to forfeit to the United States "up to the sum of five hundred dollars ($500.00) for each day of their refusal to submit the heretofore specified records for inspection and examination . . .", despite the pendency of these proceedings. Thus, the United States claimed substantial penalties solely because the plaintiffs have sought a judicial determination of their rights.

This course of action is so clearly unconstitutional that it is shocking that the United States attempted to pursue the claim. *Ex Parte Young*, 209 U.S. 123, 148 (1908); *Missouri Pacific Railroad Company* v. *Tucker*, 230 U.S. 340 (1913); *Cotting* v. *Goddard*, 183 U.S. 79, 101 (1901).

In *Wadley Southern Railway Co.* v. *Georgia*, 235 U.S. 651 (1915) the Court states at 662-63:

> "A statute, therefore, which imposes heavy penalties for violation of commands of an unascertained quality is, in its nature, somewhat akin to an *ex post facto* law, since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must, at his own risk, pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid."

In *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331 (1920), a state commission was empowered to impose a penalty "not exceeding $500 a day" for refusal to obey a Commission order. *Id.* at 335. The Court held at 337:

> "Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates."

In light of *Ex Parte Young* and the cases which follow it, there is simply no way that the government could be permitted to collect penalties on the counterclaim and still preserve the constitutionality of Section 20(7).

c. *Section 20 of the Interstate Commerce Act, Construed in the Light of Decisions of the Supreme Court, Does Not Permit the Imposition of Forfeitures Where the Person to Whom a Demand is Directed Challenges the Legal Sufficiency of the Demand*

Section 20 of the Interstate Commerce Act (49 U.S.C. § 20) contains two kinds of provisions related to enforcement of the obligations created by Section 20(5): Sections 20(7)(a) and 20(7)(e) providing for forfeiture of up to $500 per day for failure or refusal to submit materials referred to in Section 20(5) to the Commission or its authorized agents, and Section 20(9) authorizing the issuance of a writ of *mandamus* commanding a carrier to comply with the provisions of that section. By its terms, Section 20 does not limit the kinds of cases to which either of these remedies should be applied nor does it require an election between them. See *United States* v. *Clyde S.S. Co.*, 36 F.2d 691 (2 Cir. 1929).

Burlington Northern submits that, in the light of the decisions of the Supreme Court, the statute must be construed at least to exclude the application of Sections 20(7)(a) and (e) to cases which do not involve a contumacious, willful refusal or failure to comply with the provisions of Section 20(5) and to limit the action taken

to compel compliance with a demand which is contested on legal grounds to the procedures specified in Section 20(9). Any other construction of the statute would raise serious questions as to its constitutionality.

As this case illustrates, when a demand for inspection made pursuant to Section 20(5) is contested by the party to whom the demand is directed, the Interstate Commerce Commission does not provide any administrative procedure for reviewing the validity of the demand. Instead, the Commission, by request to the Attorney General, invokes either the forfeiture provisions or the *mandamus* proceedings established by Sections 16(9), 20(7)(a) and (e), and 20(9), or both, simultaneously or in succession. If the Commission requests only the *mandamus* proceedings under Section 20(9), presumably the party upon whom the demand is made could secure a hearing on his defense to the demand, and, if unsuccessful, comply without penalty. See *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, 479, 488-489 (1894). If, however, the Commission indicates its intention to proceed by invocation of the forfeiture provisions, as it did in this proceeding, unless these provisions are held to be inapplicable or judicial relief from such penalties is granted, the party upon whom the demand is made can test his right only at the risk of incurring substantial penalties.

In *Reisman* v. *Caplin*, 375 U.S. 440 (1964), the Supreme Court considered the statutory scheme provided by Congress for the issuance and enforcement of investigative subpoenas by the Commissioner of Internal Revenue (375 U.S. at 444). There the Commissioner, under authority delegated to him by the Secretary of the Treasury, was empowered to summon any person having possession of certain documents to appear before a hearing officer and to produce said documents (375 U.S. at 445). The person summoned, or any other person affected thereby, could appear before the hearing officer and challenge the summons (375 U.S. at 445). If the challenge was

rejected, and the person summoned refused to comply, the Commissioner was then required to resort to the District Court to compel compliance, and the person summoned could secure judicial review of his challenge to the summons in that proceeding (375 U.S. at 445-446).

The statute also provided, however, for criminal prosecution of any person summoned who "neglects to appear or to produce" the documents demanded by the Commissioner's summons and for "attachment . . . as for a contempt" of any person who "neglects or refuses to obey such summons" (375 U.S. at 446-448).

The Supreme Court found that both the criminal and the contempt sanctions were inapplicable where the summons is attacked in good faith (375 U.S. at 447, 448). With respect to the criminal sanctions, the Court noted the Government's concession that the section was inapplicable to persons who appear and in good faith interpose defenses as a basis for non-compliance (375 U.S. at 447 n. 6). With regard to the contempt procedures, the Court found that these provisions were intended "only to cover persons who were summoned and wholly made default or contumaciously refused to comply" (375 U.S. at 448). The Court further stated that the application of such sanctions in cases where "a witness has neither defaulted nor contumaciously refused to comply would raise constitutional considerations, which need not be considered at this time under our reading of the statute" (375 U.S. at 448 n. 8). See *United States* v. *Powell*, 379 U.S. 48, 51-52, 58 (1964); *District of Columbia* v. *Little*, 339 U.S. 1, 6-7 (1950).

It is Burlington Northern's position that, to preserve the constitutionality of Section 20(7), its actions in this proceeding must be held not to constitute a "failure or refusal" to submit records within the meaning of that section. Accordingly, there is no basis for imposition of penalties by reason of that conduct.